Office-Supreme Court, U.S.
FILED
APR 29 1963
JOHN F. DAVIS, CLERK

No. 968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

MILTON BRADLEY COMPANY and
A. C. McCLURG & COMPANY,
Petitioners,

vs.

THE GELLES-WIDMER COMPANY,
Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The oral decision, findings of fact and conclusions of law (App. D of Petition) are reported at 132 U.S.P.Q. 30. The opinion of the Court of Appeals for the Seventh Circuit (App. B of Petition) is reported at 313 F.2d 143.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether a valid copyright is forfeited by publication with notice of copyright in the trade name of an alter ego

having the same officers, employees, agents, directors and shareholders, whose respective interests are the same as the corporation in whose name the copyright was secured.

STATEMENT

Petitioners ask this Court to bring before it for review a decision of the Court of Appeals for the Seventh Circuit affirming a judgment of the District Court for the Northern District of Illinois holding respondent's copyrights valid and wilfully infringed by petitioners.

The Petition does not question the concurrent holdings of the Courts below that petitioners wilfully infringed respondent's valid copyrights. The Court of Appeals' opinion (Appendix B to Petition, page vi) points out that:

> "The trial in the District Court extended over two weeks. Eight witnesses testified before the Court and others by deposition. Each party introduced over one hundred physical and documentary exhibits. After the filing of briefs and full oral argument, the trial Court entered detailed findings of fact and conclusions of law."

The District Court's findings[1] are briefly summarized in the Court of Appeals opinion as follows (Appendix B to Petition, page vi):

> ". . . plaintiff was the author of the copyrighted educational works comprising the five individual sets of flash cards; plaintiff's educational works comprise copyrightable subject matter; defendant Bradley infringed plaintiff's copyrights by photographing plain-

[1] Appendix D to the Petition, pages xvi to xxii.

> tiff's card sets, by copying and adapting plaintiff's sequence arrangements and by substantially plagiarizing plaintiff's instructions and directions, and that defendant's copying and plagiarizing was wilful and deliberate."

The sole question raised by the Petition is whether the sometimes use of the tradename of a corporate adjunct or *alter ego* of the respondent, in whose name the copyright was secured, was a sufficient compliance with Title 17 U.S.C., Section 19 and did not forfeit the copyrights.

This issue is stated in the Court of Appeals' opinion as follows (Appendix B to Petition p. ix):

> "Defendants urge the copyrights in suit are invalid because plaintiff permitted the use of an improper copyright notice by School Aid Products Company on a small set of flash cards directed through another market distribution."

The Court of Appeals also noted with approval the District Court's findings of fact[2] that "School Aid Products Company had the same officers, employees, agents, directors and shareholders whose respective interests are the same as those of the officers, employees, agents, directors and shareholders" of respondent and that "The interests of the two companies were precisely the same." In addition it noted that petitioners "were in no way prejudiced by any reliance on the notice in the small sets" and that the director of research of petitioner Milton Bradley admitted that he had before him respondent's educational works having a notice containing respondent's name throughout the year when he was "developing" the infringing works (Appendix B to Petition, p. ix).

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[2] Findings 14 and 15, Appendix D to the Petition, page xviii).

Following the decision in *National Comics Publications, Inc.* v. *Fawcett Publications, Inc.*, 2 Cir. 1951, 191 F.2d 594, the Court of Appeals below held that notices using the name School Aid Products did not invalidate the copyright.

REASONS FOR DENYING THE WRIT

There are no considerations which warrant review by this Court of the question presented in this case. The issue, at best, is a narrow one which has uniformly been decided contrary to petitioners' position in various of the federal courts which have had occasion to consider it since the enactment of the first Copyright Law. Petitioners' main complaint seems to be that the courts below decided the issue on the basis of, and in conformity with, a decision of the Court of Appeals for the Second Circuit. While petitioners are desperate to rid themselves of the consequences of their wilful infringement and brazen plagiarism and find the law of the Second Circuit not to their liking, this hardly presents a basis for invoking this Court's powers of review. It is the existence of conflicts within the Circuits, not the uniformity, which calls for this Court's intervention. Moreover, the issue does not broadly concern the interpretation or administration of the copyright statutes nor involve the basis upon which authors and artists are protected against plagiarism of their works.

Petitioners attempt to support their petition by misstating the "Question Presented". Petitioners erroneously ask whether a court may "excuse compliance with the provisions of 17 U.S.C. §§ 10, 19". The findings of fact and conclusions of law entered by the District Court and the opinion of the Court of Appeals clearly demonstrate that these courts did not "excuse compliance" with any-

thing. Both courts specifically held that respondent had complied with all of the requirements of the Copyright Statute including the notice requirements set forth in Sections 10 and 19.[3]

The holdings of the District Court and of the Court of Appeals are in accord with the decisions of other federal courts. All the decisions on the issue have uniformly held that the requirements of the statute are met when the copyright notice is in the trade name of an adjunct of the party in whose name the copyright was secured. No decision to the contrary has been found or cited.

Petitioners err in their assertion that the decision below is in conflict with previous decisions of this Court, and of courts of other circuits, and with the broad purpose of the Copyright Law. Such assertion is apparently predicated on petitioners' misstatement of the Question Presented. The cited authorities merely hold that there must be substantial compliance with the requirements of the statute. The legislative history with which petitioners preface their argument demonstrates only that the statutory requirements have not been relaxed. The decision below did not take exception to either of these propositions.

I.

The Decision Below Is Clearly Correct And Is Not In Conflict With Decisions Of This Court.

The Court below held that, under the circumstances of this case, the publication of the works with notice of copyright in the name of School Aid Products Company did not invalidate or work a forfeiture of the copyrights secured in respondent's name. Commenting on the findings

[3] Finding 11, Conclusion 5, Appendix D to the Petition; Opinion, Appendix B to the Petition, p. ix.

of the District Court that School Aid Products Company had the same officers, employees, agents, directors and shareholders, whose respective interests were the same as those of respondent, the Court of Appeals said (App. B to Petition, p. ix):

> "The interests of the two companies were precisely the same. (Petitioners) were in no way prejudiced by any reliance on the notice on the small sets."

In reaching this decision, the Court of Appeals followed the holding in *National Comics Publications, Inc.* v. *Fawcett Publications, Inc.*, 2 Cir. 1951, 191 F.2d 594. In that case, as here, the copyrighted works had been published under the tradename of a corporate adjunct, the interests of the two corporations being identical. As in the present case, the infringer there had complete knowledge of the copyright and of the proprietor before commencing the plagiarism. Speaking through Judge Learned Hand, the 2nd Circuit Court said:

> "Since, however, the interests of the two corporations were precisely the same, we think that a notice was sufficient which used the dummy's name as proprietor. . . . We are unwilling to allow a bare-faced infringer to invoke an innocent deviation from the letter that could not in the slightest degree have prejudiced him or the public."

The decision of the Court of Appeals in the present case is also in accord with *Doran* v. *Sunset House Distributing Corp.*, D.C.S.D. Cal., 1961, 197 F. Supp. 940, *aff'd.* 9 Cir., 1962, 304 F.2d 251, where it was held that Doran, one of the copyright proprietors, did not forfeit the copyright by causing her work to be published under "Plastic Personalities", the former trade name of a company of which she was sole owner.

On all fours with the instant case is *B & B Auto Supply, Inc.* v. *Plesser*, DC SD N.Y., 1962, 205 F. Supp. 36. In that case, the Court held that B & B's copyright on a trade catalog was not forfeited because of the fact that the same catalog had also been published by Denmay Merchandising Company, a trade name or style which B & B used, and by Major Products, Inc., a corporation owned and controlled by the same persons who owned and managed B & B. The Court said in part at pages 39, 40:

> "Here, each of such companies constituted merely an *alter ego* of B & B, with the same officers, directors and shareholders as B & B. The fact that the catalog was also published with a notice of copyright naming each of such companies as the copyright proprietor is not fatal and will not cause a forfeiture of B & B's copyright where, as in this case, the companies were identical to the actual copyright proprietor from the standpoint of ownership and control."

The following decisions are to the same effect and indicate that the law applied by the Court of Appeals in the instant case has been uniformly applied since at least as early as 1894: *Dan Kasoff, Inc.*, v. *Gresco Jewelry Co.*, DCSD N.Y., 1962, 204 F. Supp. 694, *aff'd.* 2 Cir., 1962, 308 F. 2d 806; *Trifari, Krussman & Fishel, Inc.* v. *B. Steinberg-Kaslo Co.*, DCSD N.Y., 1956, 144 F. Supp. 577; *Hollywood Jewelry Mfg. Co.* v. *Dushkin*, DCSD N.Y., 1955, 136 F. Supp. 738; *Werckmeister* v. *Springer Lithographing Co.*, S.D. N.Y., 1894, 63 Fed. 808; *Woodman* v. *Lydiard-Peterson Co.*, D.C. Minn., 1912, 192 Fed. 67; *Harry Alter Co.* v. *Graves Refrigerations, Inc.*, DCND Ga. 1951, 101 F. Supp. 703. The *National Comics* decision which the 7th Circuit followed in the case at bar, was anticipated in *Fleischer Studios* v. *Ralph A. Freundlich, Inc.*, 2 Cir. 1934, 73 F.2d 276. It was there held that a copyright notice in other than the corporate name in

which the copyright was secured did not forfeit the copyright. And in that case certiorari to the Supreme Court of the United States was denied: 1935, 294 U.S. 717.

It is significant to note that petitioners do not claim that they were in any way misled or prejudiced as a result of the publication of some of the works under the School Aid Products trade name. Nor could they. Milton Bradley's director of research and development, Taft, admitted that he had the copyrighted works published by respondent before him during the time in which he "developed" the infringing sets, and that he had observed the copyright notice.[4] Taft further admitted that he photographed respondent's flash cards, notwithstanding the copyright notice, because he was in a hurry to begin competing with respondent. It was on the basis of these and similar admissions that the infringement in this action was found to be wilful and deliberate.[5]

Petitioners err in their assertion that the decision in this case conflicts with previous decisions of this Court. Rather the decisions cited by petitioners compel the result reached in this case.

Mifflin v. *White*, 1903, 190 U.S. 260 involved Holmes' *Professor at the Breakfast Table* which was first published serially in the Atlantic Monthly. The question presented to the Court was whether the publication of the last two parts of that work in the magazine which as a whole was copyrighted by its publishers, Tichenor & Fields, preserved Holmes' copyright on those two parts. The Court held that it did not, saying in part at page 263:

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[4] Appendix to Brief For Defendants, etc. p. 202-203, 351.

[5] Appendix to Brief for Defendants, etc. p. 190-197; Finding of Fact 28, 34 (App. D to Petition).

"The entry of the Atlantic Monthly, by Tichenor & Fields was evidently not intended for the protection of the author of each article therein appearing, but for their own protection, and to prevent the republication of the December number of the Atlantic Monthly."

While holding that the publication of an article without copyright notice in a magazine, which as a whole was copyrighted by its publishers, barred the subsequent claim of copyright by the author of the article, the Court did recognize that a different question would have been presented had Holmes authorized the publishers of Atlantic Monthly to copyright the article in their name. In the course of its opinion, the Court noted that "had the copyright been entered by Tichenor & Fields as agents of Dr. Holmes, it is possible that it might have been sustained. . . ." (190 U.S. at 263). The Court said, ". . . the person claiming a monopoly of publication shall pursue, in substance at least, the statutory method of securing it." (190 U.S. at 264).

The suggestion in *Mifflin* v. *White* that the copyrighting of a work by an agent in his own name with the authority of the principal is proper under the Copyright Law, is in accord with the result reached in the case at bar, as well as the decisions of other courts above referred to.

Similarly *Mifflin* v. *Dutton*, 1903, 190 U.S. 265, demonstrates the lack of basis for claiming the existence of conflict. In that case, Harriet Beecher Stowe had copyrighted 13 parts of *The Minister's Wooing*, and then contracted for publication by Atlantic Monthly magazine, such publication of each part being without any notice of copyright. As in *Mifflin* v. *White*, the sole question was whether publication by the magazine with its own notice of copyright as to the whole magazine preserved Mrs.

Stowe's copyright as to the part of her work being published serially. Under the statute then in force (since amended) this Court answered that question negatively, as it had in *Mifflin* v. *White*. There was no showing in *Mifflin* v. *Dutton* that Mrs. Stowe had authorized the magazine publishers to copyright her work, nor was there any showing of any identity of interest of any kind between Mrs. Stowe and the Atlantic Monthly publishers. Accordingly, there was no occasion to consider what the result would be if Mrs. Stowe and the magazine publishers had been, in reality, the *alter ego* of each other having identical direction, control and beneficial interests.

In *Thompson* v. *Hubbard*, 1889, 131 U.S. 123, the Court considered the effect of publication of a copyrighted work under a notice which in some instances failed to state either the date of the copyright or any proprietor thereof, and in other instances included the date but failed to designate a proprietor. The Court held that this was a failure to comply with the notice requirements of the Copyright Law and a dedication of the work to the public.

Even more inapposite is *De Jonge & Co.* v. *Breuker & Kessler Co.*, 1914, 235 U.S. 33. In that case, the Court had before it a copyright on a single artistic design. The design was printed repetitively on a sheet of wrapping paper, but the copyright notice appeared on each sheet only once as to one of the repeated designs. Since the proprietor had elected to copyright only the single design rather than the whole sheet with the design repeated on it, the repetition of the copyrighted design on the sheet without repeating the copyright notice acted as an abandonment of the copyright.

II.

There Is No Conflict Among The Circuits.

The decisions of the Court below and of the Court of Appeals for the Second Circuit in *National Comics* are not in conflict with decisions of other circuits. Petitioners' assertion that such conflict exists is erroneous.

Indeed, petitioners concede that no real or actual conflict exists between circuits, claiming only (Pet. p. 15) that the alleged conflict relates to a "philosophical difference in approach taken by the circuits." Even in this, petitioner errs.

Thus in *Egner* v. *E. C. Schirmer Music Co.*, 1 Cir., 1943, 139 F. 2d 398, the Court was faced with a situation wherein the work on which copyright was being asserted had previously been published without any copyright notice at all affixed thereto. The Court there correctly held that the prior publication without notice was a dedication to the public and invalidated the copyright.

In *Deward and Rich* v. *Bristol Savings & Loan Corp.*, 4 Cir., 1941, 120 F. 2d 537, the copyright notice was so inconspicuous as to be illegible to the unaided eye. Taking the view that the illegible notice was no notice at all, the Court held that there was publication without copyright notice of any kind and therefore the copyright had been abandoned.

Booth v. *Haggard*, 8 Cir., 1950, 184 F. 2d 470, involved the failure to place a copyright notice on the title page or the next following page of a book. *Advertisers Exchange, Inc.* v. *Anderson*, 8 Cir., 1944, 144 F. 2d 907, is concerned with the use of the letter "C" inclosed in a circle on a book of illustrations as prohibited by the prior statute (since amended in this regard).

Not one of the cases cited by petitioners in support of their assertion that there is a conflict among circuits even relates to the designation of the copyright proprietor in the statutory notice of copyright. The "approach" of these courts to the respective questions before them is simply that there must be substantial compliance with the statutory requirements. This differs neither "philosophically" nor in fact with the decision of the Court below.

CONCLUSION

Review or writ of certiorari is not a matter of right.* Where review is sought on the basis of an alleged conflict, there must in fact be a conflict, a real and embarrassing conflict. *Layne & Bowler Corp.* v. *Western Well Works, et al.*, 1923, 261 U.S. 387. No such real and actual conflict here exists and this is conceded by petitioners who only assert that there is a "philosophical difference" in "approach".

As shown, no conflict, direct or indirect, actually exists as to philosophical differences or approaches, general issues, or otherwise between the decisions of the 7th Circuit in this case and the 2nd Circuit in *National Comics* on the one hand, and the decisions of this Court or the Courts of Appeal of the 1st, 4th and 8th Circuits cited by petitioners, on the other hand. No public question is involved, there is no conflict among the circuits, nor between any circuit and this Court, and there is no confusion in the administration of the Copyright Act.

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* Rule 190, Revised Rules of the Supreme Court of the United States.

There is no basis on which petitioners' petition can be granted and, accordingly, we pray that it be denied.

Respectfully submitted,

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